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The Nature of the Judicial Process

. . . The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew.

. . . Ever in the making, as law develops through the centuries, is this new faith which silently and steadily effaces our mistakes and eccentricities. I sometimes think that we worry ourselves overmuch about the enduring consequences of our errors. They may work a little confusion for a time. In the end, they will be modified or corrected or their teachings ignored. The future takes care of such things. In the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine. . . .

From Selected Writings of

Justice BENJAMIN NATHAN CARDOZO

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BENJAMIN WEINTROUB, *Editor*

IN THIS ISSUE

FROM THE EDITOR

I have known our new President since the days when, as the then head of The Decalogue Society of Lawyers, I prevailed upon him to become the chairman of a new Decalogue project—the Committee on Legal Education. I knew him before—his reputation in the profession, his character and integrity. He made good. Administrations subsequent to mine—five of them—reappointed him to the same office.

This activity of our Society together with four or five others sponsored by our association have proved throughout the years of lasting benefit to our fellow members. Nor did our new President in the conduct of his own committee shirk the demands our Society made upon him. There came in the course of several years, in various ways, recognition of his merit; and, finally, the Presidency.

The real opportunity for service and achievement is now before Harry A. Iseberg, President. The Society, numerically speaking, has grown enormously since its foundation in 1934. A Jewish bar association, it is confronted upon occasion with problems radically different from those affecting non-minority bodies. Other bar groups are probably only academically interested in restrictive covenants, a Joseph Beauharnais philosophy, un-American quotas practiced in our medical schools, Gentiles-only resorts, unfair naturalization laws and nationality problems which stem from the place of origin of one's parents—Eastern Europe or Anglo-Saxon lands. Nor have lawyers, other than jewish, problems to solve that have resulted from the horrors of Hitler's bloody reign.

Iseberg has many tasks ahead of him, the chief of which, I believe, is to develop in our membership a keener desire for participation in Decalogue activities. Our Society is now in a sort of comfortable rut, confining its main activities from year to year to routine projects only. These are not enough. Ways and means should be found to enlist the interest of our younger members and induce them to participate in Decalogue work. Tremendous opportunities for service in the profession and in the community await a willing member.

Our new President's duty is plain: it is to lead, to initiate activities and projects that would enhance the prestige of the Bar, emphasize the stature and usefulness of The Decalogue Society of Lawyers, and to assert kinship with the problems of Jewry. All of us, rank and file members, will happily join him to work for the common good of our Bar Association. There is many a cause to espouse. There are crises all around us. The Presidency of The Decalogue Society of Lawyers is always a challenge. Let's help our President meet it.

Harry A. Iseberg – New President

A capacity audience consisting of members, their families, and friends attended the Installation ceremonies on June 13th at the Covenant Club Ball Room at which Harry A. Iseberg was installed as the 18th President of The Decalogue Society of Lawyers. Also installed were Paul G. Annes as 1st and Elmer Gertz as 2nd Vice-Presidents, Harry H. Malkin, Henry L. Burman, and Richard Fischer were inducted into office as Treasurer, Financial Secretary, and Executive Secretary, respectively.

The installing officer, Judge Abraham L. Marovitz of the Superior Court, Cook County, spoke of the fitness of our new President to hold office and predicted that under Harry A. Iseberg's leadership The Decalogue Society of Lawyers will prove an even more useful agency for service to the legal profession and to the Jewish community.

Augustine J. Bowe, Chairman of the Commission on Human Relations, City of Chicago gave an address on the obligations of the lawyer to the Bar and to the community and made a spirited plea for keener participation of the legal profession in the many problems which confront our city, state, and nation.

Mr. Iseberg's response:

The presidency of The Decalogue Society of Lawyers, an organization of over fifteen hundred lawyers of the Jewish faith, carries with it a great responsibility. Your presence here today in such large numbers and your continued interest in the organization make it possible for a president to meet that responsibility. During its eighteen years, our Society has maintained the best tradition of the American Bar. American lawyers have, I believe, made a greater contribution than any other social group to the creation and preservation of our liberties. In so doing, they only followed the earlier tradition of the lawyers and judges of England who protected the liberties of Englishmen from the tyrannies of kings.

More than seven hundred years ago, the Magna Charta proclaimed this cardinal principle for all governments to follow:

> To no one will we sell, to no one will we refuse or delay, right or justice.

HARRY A. ISEBERG

To this great underlying principle of all American and English law, the precept that every man shall have right and justice, we members of the Decalogue Society are dedicated.

Just as every historic forward step can be traced back to preceding steps, so the Magna Charta itself stems from earlier law. Was not this principle of the Magna Charta that each man shall have equal rights and justice, the same doctrine set forth earlier in another Great Charter, the Book of Deuteronomy, when the great lawgiver of Israel said:

> Hear the causes between your brethren, and judge righteously between a man and his brother, and the stranger that is with him.—Ye shall not respect persons in judgment.—Ye shall hear the small and the great alike.

Ladies and gentlemen, is it not the highest duty of all lawyers to give real meaning to the portions I have quoted from both of these charters?

The founders of our Decalogue Society conceived our Society as the medium through

which they could apply these great principles of American and Hebraic legal tradition. The rabbis of old used to teach that each generation ought to regard itself as if *it* had received the law at Mount Sinai. In this spirit, the founders of our Society re-dedicated themselves to the principle that each man, stranger or brother, great or small, should have equal justice and right.

What, then, is the task of the lawyer devoted to the principles of equal justice and right? Where, today, do we see activities which undermine the principles of the great charters? Those principles are in jeopardy, 1) wherever men inflame racial hatred or sow religious or class dissension, 2) wherever men impair democracy by denying equal rights in places of public accommodation, 3) wherever men destroy freedom of speech or press or assembly, 4) wherever equal employment opportunities are denied for reasons of color or creed.

So long as such activities prevail, our self respect as American lawyers and our sense of justice impel us to do what we can, and to do all that we can, to eradicate injustice, as our predecessors did before us, here in the United States and in England, and before that in the ancient land of Israel.

As a professional society, The Decalogue Society of Lawyers has always been devoted to assuring equality of opportunity, guarding against unwise and restrictive legislation, and fighting against racial and religious discrimination.

Such is the record of The Decalogue Society of Lawyers. It will be our responsibility to maintain it during the coming year. This we shall do, with your continued dedication to the principles we cherish, with your constant activity and interest, and with your support for the important projects our committees carry on. With your help, I shall endeavor as the incoming president, together with my fellow officers and the Board of Managers, to continue the application of the principles to which we are dedicated. It is my fervent hope that a year hence, at the conclusion of this administration, we can all feel that we have spent another period of achievement worthy of the example set by my distinguished predecessors in office.

Resolution

This community and the nation has suffered a great and irreparable loss in the sudden death of Thomas H. Wright. He, more than any other person, typified the enlightened, aroused and informed citizen in the field of human relations. He has helped Chicago to overcome tensions, riots and ill-feeling, and to educate public officials and the public in the constitutional, moral and practical necessity of maintaining law and order and to protecting all persons in the exercise of their rights as Americans and human beings. His memory lives in the effective work of the Chicago Commission on Human Relations, which he led so brilliantly and capably during the last years of his life.

The Decalogue Society of Lawyers expresses its sorrow at the passing of Thomas H. Wright and extends to his widow and family its sincerest condolence. In tribute to Mr. Wright, The Decalogue Society of Lawyers pledges to continue its own efforts in the field of human relations, so that all men and women, regardless of race, color or creed, may enjoy the blessings of individual liberty, equal opportunity and full citizenship.

SOCIETY HOST TO JUDICIAL AND STATE'S ATTORNEY CANDIDATES

While non-political in nature The Decalogue Society of Lawyers has always maintained a strong interest in the caliber and fitness of aspirants for Judicial office. In keeping with a long established custom the Society has invited as its guests, Judicial candidates who are to be balloted upon November 4th. Candidates for State's Attorney, Cook County, on Republican and Democratic tickets have also been invited.

The Republican candidates will be guests of the Society at a luncheon in the Ballroom, Covenant Club, 10 N. Dearborn Street, Friday noon, October 10th, while the Democrats are scheduled to visit with the membership Friday noon, October 24th, at a luncheon also at the Covenant Club.

PHILIP H. MITCHEL

Member Philip H. Mitchel was elected President of District No. 6, Grand Lodge B'nai B'rith.

Direct Appeals in Cases Involving the Validity of a Statute, a Construction of the Constitution, or the Validity of a Municipal Ordinance

By ARTHUR MAGID

Member Arthur Magid is an Assistant Corporation Counsel in the Appeals and Review Division of the Law Department of the City of Chicago.

Too many direct appeals to the Supreme Court are either dismissed or transferred to the Appellate Court because the cases involve neither a direct constitutional issue nor the validity of a statute or municipal ordinance. The aim of this article is to call attention to some of the tests that may be employed to ascertain whether proper grounds for a direct appeal do exist in a given case, so that this needless waste of legal effort by attorneys and by an already overburdened Supreme Court may, so far as possible, be eliminated.

Section 75 (1) of the Civil Practice Act provides as follows:

"Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or the validity of a statute or the validity of a county zoning ordinance or resolution or a construction of the constitution is involved, and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the pubiic interest so requires, and in all cases relating to revenue, or in which the State is interested as a party or otherwise." (Chap. 110, par. 199 (1), Ill. Rev. Stat., 1951).

The foregoing section is a re-enactment, without substantial change, of the language of Section 118 of the Practice Act of 1907, (Chap. 110, par. 118, Smith-Hurd Ill. Rev. Stat., 1931). Cases decided either before or after the effective date of the Civil Practice Act will therefore be equally appropriate.

This discussion will be limited to a consideration of the requirements for a direct appeal to the Supreme Court in cases involving "a construction of the constitution," "the validity of a statute," or "the validity of a municipal ordinance."

Several obvious but difficult questions immediately come to mind, as follows:

(1) Is a "construction of the constitution" involved only in cases where a specific provision of the constitution (state or federal*) requires judicial interpretation to determine whether or not it confers a power sought to be exercised or guarantees a right claimed to be infringed? Or does it also include cases where the erroneous construction or application of a statute, ordinance or other rule of law is claimed to effect an unconstitutional result?

(2) Is a trial court certificate necessary where the question of "the validity of a municipal ordinance" depends upon "a construction of the constitution," *i.e.*, upon the decision of a constitutional question?

(3) What does the word "validity" mean, and does it have the same meaning in the phrase "the *validity* of a municipal ordinance" as in the phrase "the *validity* of a statute?"

(4) If the existence of a constitutional question gives the Supreme Court jurisdiction of a direct appeal in any event, does the word "validity" mean something other than "constitutional validity" whether with respect to a statute or a municipal ordinance?

(5) Does the Supreme Court have jurisdiction of a direct appeal in a case where the validity of a statute is questioned on other than constitutional grounds?

(6) With particular reference to a municipal ordinance, is a trial court certificate necessary only where its validity is questioned on other than constitutional grounds?

All of these questions are more easily asked than answered, and some of them must await further judicial clarification.

It is quite clear, from an examination of the

* Questions arising either under the Constitution of Illinois or the Constitution of the United States afford equal jurisdictional basis for a direct appeal under Section 75 (1) of the Civil Practice Act. (*Parker* v. *People of the State of Illinois*, 333 U. S. 571. *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U. S. 190; *Tovey* v. *Levy*, 401 Ill. 393; *Shaw* v. *Shaw*, 397 Ill. 118; *Rothschild & Co.* v. *Steger & Sons Piano Co.*, 256 Ill. 196.)

Illinois cases on the subject, that "a construction of the constitution" is involved only in those cases where a statute, ordinance or other rule of law is assailed as repugnant to a specific provision of the constitution. The constiutional attack must be directed against the legislation itself, and not merely against its construction, operation or effect. (*American Smelting & Refining Co.* v. *City of Chicago*, 409 Ill. 99; *Village of Riverside* v. *Kuhne*, 397 Ill. 108). Thus it has been held that the construction or application of a statute or ordinance in such a manner as to give it an unconstitutional effect does not present a constitutional question so as to authorize a direct appeal to the Supreme Court. (*Perrine* v. *Bisch & Son*, 409 Ill. 175; *Ernhart* v. *E. J. and E. Ry. Co.*, 399 Ill. 512; *Pollack* v. *County of Du Page*, 371 Ill. 199; *City of Chicago* v. *Iroquois Iron & Steel Co.*, 361 Ill. 330; *Hawthorne Kennel Club* v. *Swanson*, 339 Ill. 220).

So, also, no constitutional question is presented by the claim that the enforcement of a judgment or decree will deprive the party against whom it is rendered of some constitutional right. (*People* v. *Savanna Lodge*, 407 Ill. 227; *Biggs* v. *Plebanek*, 407 Ill. 562; *Chicago Bar Ass'n* v. *Kellogg*, 401 Ill. 375; *Northwestern Institute of Foot Surgery and Chiropody* v. *Thompson*, 386 Ill. 615).

The case of *Ernhart* v. *E. J. and E. Ry. Co.*, 399 Ill. 512, already cited above, is particularly valuable for its discussion and analysis (at pp. 515-519) of many Illinois decisions on this subject. It will be helpful to refer to some of these:

In *Bradford Supply Co.* v. *Waite*, 392 Ill. 318, a contention that the court gave the Practice Act an unconstitutional interpretation was held not to raise a constitutional question reviewable directly by the Supreme Court.

In *Perlman* v. *Thomas Paper Stock Co.*, 378 Ill. 238, a contention that the judgment entered by the trial court deprived appellant of its constitutional right to a jury trial afforded no ground for a direct appeal.

It is also important to point out in this connection that even if a true constitutional issue is involved and presented, it must actually have been passed upon by the trial court before it can be made the basis for a direct appeal. (*Biggs* v. *City of Chicago*, 411 Ill. 566; *City of Monmouth* v. *Lawson*, 408 Ill. 284; *City of Chicago Heights* v. *Public Service Co.*, 408 Ill. 310).

Another point to remember is that if the constitutional question has already been settled by prior decisions, and is no longer debatable, the Supreme Court will refuse to take jurisdiction of a direct appeal. (*Hale* v. *Kinsey*, 408 Ill. 282; *Richter* v. *City of Mt. Carroll*, 398 Ill. 473; *People* v. *Estep*, 409 Ill. 125; *People* v. *Savanna Lodge*, 407 Ill. 227).

In the light of the foregoing discussion, it becomes exceedingly important for counsel to carefully analyze the nature of the legal issues involved in the case before deciding that there was presented to and decided by the trial court that kind of constitutional issue which is within the direct appeal jurisdiction of the Supreme Court. In *Ernhart* v. *E. J. and E. Ry. Co.*, 399 Ill. 512, the Supreme Court, after discussing numerous cases on this very subject, stated the following (p. 519):

"We have referred to these many cases in the hope that counsel will examine every constitutional question, or alleged invalidity of a statute, before filing a direct appeal to this court, not only to avoid unjustly delaying the decision of a cause, but also placing upon the records a useless and unnecessary opinion."

Having considered the question of what is a constitutional issue within the phrase "a construction of the constitution," the next problem to be discussed is what is the meaning of the word "validity" in the phrase "the validity of a statute" and in the phrase "the validity of a municipal ordinance." Before arriving at a definition of the word "validity," it should be pointed out that where the question of the "validity" of a statute or ordinance requires "a construction of the constitution," the direct appeal jurisdiction flows from the existence of the constitutional issue and not necessarily from the issue of the "validity" of the legislation. In such a case, no trial court certificate would be necessary (where a municipal ordinance is involved) in order to authorize the direct appeal. As the Supreme Court said in *People* v. *Clean Street Co.*, 225 Ill. 470, (p. 484):

"If the validity of an ordinance involves a construction of the constitution, this court has jurisdiction on direct appeal . . . ."

So, also, in *Village of Lake Zurich* v. *Deschauer*, 310 Ill. 209, (p. 211):

"It is true that the enforcement of an ordinance may

involve a construction of the constitution and we may be authorized to assume jurisdiction of an appeal on that ground."

Of course, where a *statute* is involved, it is not too important whether the issue presented is the constitutionality of the statute, or its *validity* on a non-constitutional ground, since in either instance a direct appeal is authorized under Section 75 (1) of the Civil Practice Act. However, in the case of a municipal *ordinance*, the distinction between *constitutionality* and *validity* is material, since no trial court certificate is necessary where the *constitutionality* of the municipal ordinance is attacked, but is only necessary where merely its *validity* is questioned. What then is the true meaning of the word "validity" as used in Section 75 (1) of the Civil Practice Act?

Webster defines the word "validity" as follows:

"Legal strength, force, or authority; that quality of a thing which renders it supportable in law or equity; legal sufficiency; . . ." (Webster's New Int. Dict., 2nd Ed., p. 2814).

In Volume 66, Corpus Juris, the following definition is given:

"In its legal and technical signification, "validity" means legal strength or force; legal sufficiency; that quality of a thing which renders it supportable in law or equity; effectiveness in point of law." (66 C. J. p. 415.)

While the above definitions are broad enough to include *constitutionality* within the concept of *validity*, it is clear from the context of the statute that validity means legal effectiveness on other than constitutional grounds. This is so for several reasons:

(1) If validity means constitutionality, then the phrase "a construction of the constitution" becomes superfluous and devoid of independent meaning. It is a well settled rule of statutory construction that statutes must, if possible, be so construed as to give effect to each word, clause or sentence, in order that no such word, clause or sentence may be deemed superfluous or void. (*Stiska* v. *City of Chicago*, 405 Ill. 374, 382). To give meaning to the phrase "a construction of the constitution," the word "validity" must have a meaning other than constitutional validity, and, therefore, must mean legal effectiveness on other than constitutional grounds.

(2) Where a municipal ordinance is attacked on constitutional grounds, no trial court certificate is necessary for a direct appeal. (*City of Watseka* v. *Blatt*, 381 Ill. 276, 277; *City of Bloomington* v. *Wirrick*, 381 Ill. 347, 350). A certificate of the trial court is required only where the validity of the ordinance is challenged on other than constitutional grounds. (*City of Monmouth* v. *Lawson*, 408 Ill. 284, 285-286). If "validity" meant "constitutionality," the requirement of a trial court certificate in ordinance cases would be pointless.

It must be concluded, therefore, that "validity" means legal effectiveness on other than grounds of constitutionality. In the case of a statute, the issue may be: (1) Was the statute properly enacted? (2) Is it in full force and effect? (3) Has it been repealed by a later statute? In the case of a municipal ordinance, the question may be: (1) Is it within the statutory grant of legislative power to municipalities? (2) Was the ordinance properly enacted? (3) Has the ordinance been abrogated by a later statute or repealed by a later ordinance? The foregoing enumeration of non-constitutional issues of validity is by no means exhaustive.

A serious question arises from this analysis. Does it mean that the question of the validity of a statute on non-constitutional grounds is not within the jurisdiction of the Appellate Court, but *must* be brought to the Supreme Court on direct appeal? An old Appellate Court decision from the Fourth District has indeed so held. In *City of Cairo* v. *Bross*, 8 Ill. App. 296 (1881), defendant was prosecuted for violating a city ordinance in neglecting to procure a merchant's license. Under its earlier special charter (Act of 1867), the city was granted the power to license merchants. Later the city was organized under the Cities and Villages Act of 1872 which did not confer such power. The question presented was whether the special charter was still in force in so far as not inconsistent with the later general statute, or whether the grant of power to license merchants contained in the special charter was repealed by the general law which failed to include such grant of power. The Appellate Court stated the nature of the issue as follows (p. 297):

"It is apparent, therefore, that we are directly called upon to determine the *validity* of so much of the special charter as confers this power." (Emphasis supplied).

The court then defined "validity" as follows (p. 297):

"Validity, when applied to legal matters, is defined to be legal strength or force, the quality of being good in law."

The court then pointed out (p. 297) that the Practice Act, as then in force, provided "that cases in which the validity of a statute is involved, shall go directly to the Supreme Court." The Appellate Court thereupon held that it was without jurisdiction to entertain the appeal and dismissed it, saying (p. 297):

"We have no jurisdiction, and must, therefore, on our own motion, dismiss the appeal for that reason."

Here, then, is a decision holding that a case presenting the question whether a later statute repealed an earlier statute is one in which the "validity" of a statute is involved, and must therefore go to the Supreme Court on direct appeal. On this analysis, the Appellate Court not only lacks the power to pass upon a constitutional question but also lacks the power to pass upon the non-constitutional validity of a statute. The curious result would also seem to follow that whether the Appellate Court has the power to decide the non-constitutional validity of a municipal ordinance would depend upon whether or not the appellant has obtained a trial court certificate. If he has, then the case must be appealed directly to the Supreme Court; and only if no certificate is procured, may the case be appealed to the Appellate Court.

Another interesting case is *Wood* v. *City of Chicago,* 205 Ill. 70, where the only questions involved were whether the power to pass a certain municipal ordinance was given by statute, and whether the ordinance was reasonable. The Supreme Court held that these questions related only to the validity of the ordinance on other than constitutional grounds, and dismissed the direct appeal. The court pointed out that if the validity of a statute were involved, (although on non-constitutional grounds), it would have jurisdiction of a direct appeal. And the court further said that if a construction of the constitution were involved, it would possess direct appeal jurisdiction, and that (p. 72): "In such a case it is immaterial whether the denial of a constitutional right is in a statute or in an ordinance passed by virtue of a statute."

An example of when the validity of an ordinance involves a construction of the constitution so as to be within the direct appeal jurisdiction of the Supreme Court with or without a trial court certificate is found in the case of *Barrett Manufacturing Co.* v. *City of Chicago,* 259 Ill. 578. In that case the question presented was whether amended ordinances, enacted after certain construction permits had been issued pursuant to the ordinances in existence at the time, could be given a retroactive application. The Supreme Court held that this question involved the issue whether it was a constitutional exercise of legislative power to give the amended ordinances a retrospective application, and that, therefore, it had jurisdiction of the direct appeal, although it further held that it did not have to decide that constitutional question but could dispose of the case by a proper construction of the ordinances. This does not mean that the Supreme Court took direct appeal jurisdiction of a case in which only the construction of an ordinance was involved, because the trial court had held that the amended ordinances could be retroactively enforced. Thus the constitutional issue of whether such retroactive application could be made was directly involved in the case, and the Supreme Court did not lose jurisdiction of the direct appeal merely because it found that it could dispose of the case without deciding the constitutional question.

We now come to the question of the effectiveness of a trial court certificate that the validity of a municipal ordinance is involved in a case where the record does not support the certificate. In such event, the certificate is ineffectual to confer direct appeal jurisdiction. (*Schneider* v. *Board of Appeals of City of Ottawa,* 402 Ill. 536; *City of Chicago* v. *Krema Trucking Co.,* 401 Ill. 411, 414). Where only the construction or application of an ordinance is involved, and no question of its validity on constitutional or non-constitutional grounds is presented, then the statutory requirements for a direct appeal are lacking. The trial court certificate cannot create an issue of validity where there is none, and the only function of the certificate is to declare that the public interest requires a direct appeal. The question of the validity of the ordinance must have independent existence in the record apart from the certificate.

We have attempted to find a common and consistent thread running through the vast number of decisions on this entire subject, and we believe we have succeeded in doing so to some extent. However, the recent case of *American Smelting & Refining Co.* v. *City of Chicago,* 409 Ill. 99, seemingly represents a departure in principle, and for that reason requires special analysis.

In that case, an action was brought by an owner of property to have a certain amendatory zoning ordinance declared invalid, and its enforcement enjoined, on the claimed ground that, by rezoning the property from manufacturing to apartment use, the ordinance (1) deprived plaintiff of its property without due process of law, and (2) resulted in a taking or damaging of private property for public use without just compensation. Issues were joined, and the trial court, confirming a Master's Report, specifically adjudicated that the zoning ordinance was unconstitutional as applied to plaintiff's property in the particular respects claimed by the plaintiff. A direct appeal was taken to the Supreme Court—without a trial court certificate having first been obtained. The appellant contended that no such certificate was necessary because a decision as to the validity of the ordinance required a determination of fundamental constitutional issues. The Supreme Court, however, held that the absence of a trial court certificate precluded the assumption of jurisdiction on direct appeal, saying (p. 104):

"No general constitutional question is presented which would otherwise give us jurisdiction, since it is not claimed the amendments to the zoning ordinance are bad, but only void as applied to certain property. The construction or application of a statute or ordinance to a particular property does not present a constitutional question."

The question arises whether the distinction drawn by the Supreme Court between a "general constitutional question" and the issue of whether the zoning ordinance was "void as applied to certain property" does not impose a limitation upon its own jurisdiction on direct appeal not justified by Section 75 (1) of the Civil Practice Act. It would seem, on first impression, that a contention that a municipal zoning ordinance, containing certain restrictions against the use of property, is invalid because such restrictions are violative of constitutional rights, presents a direct constitutional question. The fact that the issue is confined to particular property would not change its essential character, since every case must necessarily be limited to the particular interests of the parties to the litigation. Indeed, no rule is more firmly settled than that constitutional issues are never decided in a vacuum, and that no one can attack the validity of an ordinance on grounds which do not affect him. (*City of Elmhurst* v. *Buettgen,* 294 Ill. 248; *People* v. *Spencer,* 369 Ill. 57). We must assume, therefore, that the distinction made in the *American Smelting Co.* case is not between "general" and "particular" unconstitutionality. Thus the Supreme Court regarded the issue involved as being merely one of the "construction or application" of the zoning ordinance. As the court said (p. 104):

"The *construction* or *application* of a statute or ordinance to a particular property does not present a constitutional question." (Emphasis supplied).

It is pertinent to inquire, first, whether the issue involved in the *American Smelting Co.* case might not really have been one of the *constitutionality* of the ordinance rather than merely its *construction* or *application.* The argument would proceed somewhat as follows: Plaintiff squarely raised the question whether the zoning restriction bore a reasonable relation to the public health, safety, comfort, morals or general welfare—which is the classic test of whether a zoning ordinance represents a proper exercise of the police power. (*Trust Co. of Chicago* v. *City of Chicago,* 408 Ill. 91). An owner of property (so the argument runs) has the constitutional right to use his property for any purpose he desires, except as it is limited by a reasonable exercise of the police power. Where the zoning is not within the police power, the restriction it imposes constitutes an infringement of the property owner's constitutional right of unfettered use of his property. Would it not appear, therefore, that a claim that a zoning ordinance is not a reasonable exercise of the police power, and deprives an owner of his property (*i.e.,* the right to use it free of such restriction) without due process of law, and that it constitutes a taking or damaging of private property for public use without just compensation, presents the question of the *constitutionality* of the ordinance,

and not merely an issue as to its validity on non-constitutional grounds, and certainly not merely the question of its construction or application?

Whatever the logic or persuasiveness of the above argument, the Supreme Court has definitely ruled that the question whether a zoning ordinance is reasonable as applied to certain property does not present an issue as to the constitutionality of the ordinance, but merely one as to its construction or application. But then another serious problem immediately asserts itself, namely: If the question is merely one of construction or application of the ordinance, then no direct appeal can be taken *even if a trial court certificate is obtained.* As already pointed out, the trial court certificate confers direct appeal jurisdiction only if the issue is one of "validity" of the ordinance and not merely one of its construction. Therefore, the *American Smelting Co.* case might well be regarded as holding that no direct appeal could have been taken from the decision that the zoning ordinance was unreasonable as applied to plaintiff's property, *even had a trial court certificate been obtained.* Such a conclusion, however, would have serious repercussions in view of the fact that in numberless cases the Supreme Court *has* taken jurisdiction of direct appeals where the question was merely as to the reasonableness of a zoning ordinance and where a trial court certificate had been obtained. Does that mean then that the Supreme Court was without direct appeal jurisdiction in all of these cases? In order to avoid this result, the apparent dilemma occasioned by the decision in the *American Smelting Co.* case must be resolved. Perhaps that can be done by making a distinction between a constitutional question which is *direct* and *primary,* and one which is *consequential* and *secondary.* For example, the question whether a statute or ordinance can be retroactively applied, once it is determined that it affects a substantive right rather than a matter of procedure, involves the direct constitutional question whether the legislation, if so applied, offends the constitutional inhibition against the enactment of *ex post facto* laws. The issue cannot be resolved by a decision below the constitutional level. On the other hand, the question whether a judgment is void because rendered on service of process claimed to be defective is one of *consequential validity.* It is true that to enforce such a void judgment would result in a taking of property without due process of law, yet the issue can be adequately resolved without direct involvement of the due process provision of the state and federal constitutions but merely by an adjudication on appeal as to whether or not the service of process was defective. Similarly, the question whether or not a zoning ordinance should be applied and enforced as to certain property can be fully resolved by deciding whether it bears a reasonable relation to the public good. Here, also, it is true that the application or enforcement of the zoning ordinance may well result in the taking of private property without due process of law, but that is only a *consequence* of the determination of the reasonableness of the ordinance. It is not a direct holding upon a constitutional question. Both in the case of a judgment rendered on void process, and in the case of the claimed unreasonableness of a zoning ordinance, the issues can be fully determined without a decision upon a constitutional question, although the adjudications may give rise to an unconstitutional result. Thus the decision in the *American Smelting Co.* case may well be regarded as holding that the question of the reasonableness of a zoning ordinance raises an issue of *consequential validity* and not of *direct constitutionality.* The statement in the opinion that the issue was merely one of "construction or application" of the ordinance was not necessary to the decision and may be regarded as mere *dictum.* Upon such analysis, the *American Smelting Co.* case fits into the pattern of decisions on the subject, and, moreover, possesses particular significance in that it makes it clear that appeals in cases involving the reasonableness of municipal zoning ordinances properly lie to the Appellate Court, and are not within the direct appeal jurisdiction of the Supreme Court unless the required trial court certificate has been obtained.

NATHAN D. KAPLAN — In Memoriam

By ELMER GERTZ

Vigorous of speech to the end, clear of mind, Nathan D. Kaplan died at 75, on the first day of July. While he had recently undergone surgery, his death was unexpected. It occurred, as the result of a heart-attack, on the very day of his return to his office. Thus he died, as he had lived, with his thoughts centered on work to be done, rather than things achieved.

A few months ago, he had written, characteristically, a poem with the title and refrain, "I want to die young." Although past the Psalmist's three score years and ten, he was young. As such we remember him. Instead of mourning him with barren words, we think in terms of living memorials to the causes he held dear—Zion, Jewish education, juvenile protection, the law. The Decalogue Society of Lawyers, whose Board he graced during his last years, is contemplating an appropriate marking of his memory.

Nathan Kaplan was born in Mariampol, Russia, on May 17, 1877. He was only six, when he came to the United States but he was as fiercely American as one who had arrived on the Mayflower. He proved Brandeis' thesis that Zionism and Americanism are not incompatible.

For more than half a century he was connected with the movement to establish a Jewish homeland in Palestine. He was grand secretary and vice-president of the Knights of Zion and president of the Zionist Societies of the Middle West and of the Z.O.C. In addition, he was associated in an official capacity with all of the groups striving to bring about the rebirth of Israel, including the American Jewish Congress. Learned in Jewish law, lore and literature, he was an ardent devotee of our ancient traditions.

He lived in Tel Aviv for many years, assuming a place of leadership from the start, as President of the Palestine Trust Co., director of the Great Mortgage Bank of Palestine, president of the American Jewish Association of Palestine, president of the volunteer fire brigade, and member of the municipal council.

At the same time that he was giving of himself to Zion, he worked at home for great civic causes. Preeminent among these were the Chicago Hebrew Institute (now known as the J.P.I.) and the Juvenile Protective Association, of both of which he was a founder and of the former for years president and a director. In token of his abiding interest in all cultures, he was a life member of the Art Institute and Field Museum of Chicago. He was the most companionable of men, always enthusiastic and informative and never pompous. His devoted wife Miriam was exactly the kind of mate he deserved, a seeker and student in her own right.

In token of 50 devoted years as a lawyer, he was named as a senior counselor by the Illinois Bar Association in 1950. He exemplified the lawyer at his best: the civilized man, the community leader, the gazer into the stars of the good, the true and the beautiful.

REPORT ON 82nd CONGRESS

Member, Congressman Sidney R. Yates of the 9th Congressional District will speak before The Decalogue Society of Lawyers at a luncheon Friday, September 26th, in the Grand Ballroom of the Covenant Club, 10 North Dearborn Street.

Mr. Yates' subject will be "Report on 82nd Congress." Members and their friends are urged to attend.

SOLOMON RIVLIN — In Memoriam

Member Solomon Rivlin, who died suddenly August 15th while vacationing in Colorado, was 58 years of age, born in Jerusalem. For the past 3 years he was Executive Director of the Chicago Council, Jewish Theological Seminary of America and the Chicago Council United Synagogues of America. Prior to these posts, two others he held were Executive Director of the Jewish National Fund Chicago Branch, and Director of the Ontario, Canada, Zionist Region.

Rivlin was ordained a rabbi at the Jewish Theological Seminary of America in 1921. He had his B.A. from the City College of New York, M.A., L.L.B., and J.D. from Drake University, and was admitted to the Iowa Bar in 1924.

Beauharnais vs. People of the State of Illinois

By SAMUEL D. GOLDEN

The Beauharnais case uniquely illustrates how good principles can conflict harshly in action. We all accept the principle of free speech; and we all recognize the principle of equal rights and opportunities for persons of all races, religions and national origins. These two basic principles underlie the decision in the Beauharnais case. 343 U. S. 250.

Joseph Beauharnais was convicted under a little-used Illinois statute providing:

"It shall be unlawful for any person to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion, which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riot. . . ." *(Ill. Rev. Stat. Ch. 38 Pg. 471)*

The facts showed that Beauharnais as president of the "White Circle League of America, Inc.," had organized the distribution of leaflets in downtown Chicago. The leaflets cast in the form of a petition to the Mayor and City Council, asked white persons to join the League and circulate petitions with the object, as stated in the heading of the leaflets, to "Preserve And Protect White Neighborhoods From The Constant And Continuous Invasion, Harassment and Encroachment By The Negroes." The leaflets contained a number of inflammatory statements, including the following:

"If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."

At the trial Judge Joseph H. McGarry of the Municipal Court of Chicago, directed the jury to find the defendant guilty if they found that he published, presented or exhibited the leaflet in a public place. The judge refused an instruction which would have allowed the jury to consider whether the leaflet presented a clear and present danger of substantive evil to the public. On appeal, the Illinois Supreme Court affirmed the conviction, and the U. S. Supreme Court granted certiorari.

For the five-man majority in the U. S. Supreme Court, Justice Frankfurter upheld the statute, saying that it did not contravene the freedoms of speech and the press, and was not void for vagueness, under the Fourteenth Amendment. He held that the statute was equivalent to a criminal libel law applying to groups instead of individuals. He reasoned "No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, user of marijuana." If it is good law to punish individual libel criminally, then what is there in the Fourteenth Amendment to protect identical libels against a group? And as to any alleged ambiguities which might exist in the various terms in the statute, the established law of criminal libel will resolve these. According to Frankfurter, the history of race violence in Illinois well justified the state in attempting to prevent what might often be an immediate cause of disorder; namely irresponsible published attacks on minority groups.

Justices Black, Reed, Douglas and Jackson dissented in separate opinions. Justice Black cited that part of the First Amendment which states: "Congress shall make no law abridging the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Since the leaflet was just such a petition to redress grievances, addressed to elected representatives of the people, Justice Black felt that, as applied to the leaflet, the statute violated the Due Process Clause of the Fourteenth Amendment, which he believed carried over the cited language of the First Amendment as a limitation on the states. Justice Black also argued that the statute imposed state censorship over the individual exercise of discussion. What might be accepted speech in some localities might be considered objectionable in others. As he said, ". . . The same kind of state law that makes Beauharnais a criminal for advocating segregation in Illinois can be utilized to send people to jail in other states for advocating equality and non-segregation."

Justice Reed felt that the conviction should

have been reversed because parts of the statute on which it was based are too ambiguous to be understood. The words "virtue," "derision" and "obloquy" have no general or special meanings well enough defined to advise the public on the proper limits of speech. Justice Douglas, who also concurred with Black and Reed, argued in his separate dissent that the majority decision, in allowing conviction for speech without regard to the clear and present danger of the speech, "represents a philosophy at war with the First Amendment—a constitutional interpretation which puts free speech under the legislative thumb." Douglas believed that this decision would support the conviction of a Negro for heatedly denouncing lynch law, of whites for complaining of the competition of Mexicans or Orientals, and of a minority religious group complaining of the majority group's advantages in securing employment.

Justice Frankfurter answered the dire predictions of Black and Douglas with the statement that "While this court sits" the people may be assured that their liberties will be protected against an unjustified extension of the libel law. Justice Black replied "This case raises considerable doubt" that the court will protect the people's liberties.

In his dissent Justice Jackson rejected the argument of his colleagues that the First Amendment freedoms carried over in their entirety into the Fourteenth Amendment as limits on State action, and found that the Fourteenth Amendment simply safeguards the "ordered liberty" of persons in the states. While under the First Amendment Congress might not pass a criminal libel law, nevertheless, under the Fourteenth the states may do so. This new "ordered liberty" concept Jackson translates into the "clear and present danger" test of Justices Holmes and Brandeis. Jackson deplored the action of the trial court, as upheld by the Illinois Supreme Court in precluding the defendants from introducing evidence upon the defenses of truth and fair comment in defense of the statute. He particularly derided the denial of any inquiry into the context in which the publication was made: whether the words would tend to cause disorder at the time and place of publication, and thus satisfy the clear and present danger test.

Many lawyers and laymen associated with minority groups will feel satisfaction that the Supreme Court has approved the principle of a "group libel" law. The problem of adequately protecting minority groups against the irrational prejudiced attacks of other groups and individuals has caused much concern among persons interested in group relations. A law imposing a criminal penalty upon persons committing outrageous public attacks on racial, religious or credal groups may therefore commend itself to many people.

On the other hand, Justice Black's warning at the close of his opinion is instructive: "If there be minority groups who hail this holding as their victory, they might consider the possible relevance of this ancient remark: "Another such victory and I am undone." Certainly the dangers implicit in such a statute should be made clear. Under it the judge alone determines whether a certain pamphlet is objectionable, without even considering the probable effect on the particular audience to which it is addressed, and then submits to the jury only the question of whether it was published. Judges may differ as to what would be objectionable matter. A strong attack on the parochial school system, for example, might be found to be objectionable under the statute. The statute certainly is drawn so loosely that it could be invoked to clamp down upon many kinds of publication which we have long felt to be proper in our democratic country. The real probability of the use of this statute to censor political and other free discussion should make us consider carefully whether it is consistent with our philosophy of government.

This case illustrates the need for a serious study of the problem of protecting minority groups while retaining the greatest measure of freedom of speech and the press. The harmony between the principles mentioned at the beginning of this comment can be brought about only by careful study and full awareness of the problem. Beauharnais case tells us that a group libel law is constitutional. However, even Justice Frankfurter admitted that there are doubts of the wisdom of the approach taken by this statute. (343 U. S. 250, 261) The Decalogue Society and other bar and civic groups should accept the responsibility of investigating the problem thoroughly and searching for better solutions.

Civil Rights in Places of Public Accommodations

From the Report on the 4th Chicago Conference on Civic Unity, Commission on Human Relations, held April 21st through June 2nd, 1952, entitled "Gains in the Field of Law and Civil Rights, 1949-1952," by Maynard I. Wishner, acting executive director Commission on Human Relations, and member of our Board of Managers.

The 3rd Chicago Conference on Civic Unity in 1948 stated the situation with respect to equality of treatment in places of public accommodations in the Chicago area as follows:

"It would be incorrect to assume (from the foregoing) that there is a clear policy of non-compliance with the statute. Many of Chicago's major hotels continue to accommodate organizations with interracial membership. Although in some cases, the relative number of minority group members will be significant in determining the success of an attempt to arrange for such accommodations."

In the light of the above statement it seems pertinent to quote from a report the Commission prepared at the request of the Church Federation of Greater Chicago in January of this year. That organization was interested in presenting to the National Council of Churches which was in the process of selecting a site for its national headquarters an accurate statement on the treatment of minority peoples in Chicago, one of the criteria established by the national body for site selection. The Commission stated in part as follows:

". . . Based in law under the State Civil Rights Statute which makes it unlawful to deny equal privileges and accommodations in some thirty categories of establishments including restaurants, hotels, department stores, theatres, public transportation, etc., it has now been three years since any substantiated complaint of discriminatory practices by major loop hotels or restaurants has been reported to the Commission. This has not always been the practice in our City, but significant changes have occurred during the past five years. Barriers which had existed first began to fall under the impact of the increasing number of major national organizations holding conventions and meetings in Chicago, whose constituency was interracial. Today, all-Negro organizations have and continue to be accommodated without question in the use of all dining and meeting facilities in these hotels as well as rooms for housing their visitors to our City. For example, the African Methodist Episcopal Church is holding its quadrennial convention in Chicago this spring and has already secured adequate accommodations, both for meeting and housing in the center of the city without any difficulty. A Baptist group of similar racial composition met in Chicago a year ago and found a similar reception afforded without incident of any sort. The final test of the openness of the city in this regard, of course, depends on the treatment which is afforded to an individual traveler who comes without organizational connection and attempts to secure accommodations. We believe it fair to say that such a person will be courteously treated and accommodated in the kinds of establishments enumerated above . . ."

The Church Federation upon receiving this report conducted its own independent investigation and found the above-described condition existing not only in pious statements of policy, but in actual day-to-day practice.

We can thus modify the closing paragraph of the 1948 report to read almost the opposite, but with similar caution:

"It would be incorrect to assume from the foregoing that there is an overall clear policy of *compliance* with the statute. But discriminatory practices have continued to decrease. The occurrence of such practices has almost become the exception and the problem area has shifted from the loop, our first area of concern, to some of the establishments operating in outlying sections of the City."

The emergence of several local community organizations interested and working on this problem in their own communities represents a new asset in this effort.

The Civil Rights recommendations of the 1948 Conference were principally concerned with legislative action to provide for administrative enforcement and with specific suggestions for effecting greater use of the City's licensing power. No progress has been made in securing a state commission with enforcement powers, although a growing number of other jurisdictions have adopted such procedures. Principal legislative effort by those from whom support for such statutory enactment would come has been directed toward Fair Employment Practices Legislation as top priority.

An opinion was secured from the Corporation Counsel's Office on the recommendations relating to the use of local licensing powers for enforcement of Civil Rights Laws. That opinion paved the way for some of the proposals and pointed out what it regarded as some legal obstacles in the way of others. None of that specific group of recommendations have been effected as yet.

The last conference expressed its interest in the "Civil Rights Handbook" prepared by the

Commission. That handbook has been distributed and because of great demand was modified, brought up to date, and reprinted in cooperation with the Illinois Commission on Human Relations. Incidentally, one of the major uses of the booklet has been its distribution to all men undergoing Police Department training, many of whom carry it with them for ready reference.

The Commission continued its own case-by-case activity of education, negotiation and persuasion to secure compliance. It is to the credit of persons bringing complaints that their principal concern, as is that of the Commission, has generally been wherever possible to secure changes of practice rather than to insist on punishment or monetary damages.

HOSPITALIZATION INSURANCE

L. Louis Karton, Chairman Decalogue Group Hospitalization Insurance Committee, announces that the Reserve Insurance Company, the agency which carries our Hospitalization Insurance will begin another enrollment of members November 1st for about 30 days.

Members interested in obtaining such insurance are invited to write for details to W. J. Henderson Organization, authorized agents for Reserve Insurance Company, at 180 West Adams Street. Telephone ANdover 3-7410.

ATTENDS ACCOUNTING CONGRESS

Member George L. Weisbard has recently returned from London, England, where he attended the Sixth International Accounting Congress. Weisbard, who specializes in federal taxation addressed the London Congress on problems of international double taxation; he urged also the adoption of standard accounting terminology, on an international basis, so that stockholders may be more fully informed of the progress of their investments in foreign enterprises. While in England, France and Italy, Weisbard made an extensive study of the economics of the motor transport industries. In Switzerland, he investigated problems of stock-holder relationships, a subject on which he is a frequent lecturer.

APPLICATIONS FOR MEMBERSHIP

H. Burton Schatz, *Chairman*

Bernard Epton, Joseph Solon, Seymour Velk, *Co-Chairmen*

APPLICANTS	*SPONSORS*
Arthur S. Freeman	M. N. Andalman & Benjamin I. Morris
Fred Jasmer	Hyman Abrams & David Linn
Leonard L. Leon	M. N. Andalman & Alan Katz
Marvin Lustgarten	Edna B. Levy
Arden Archie Muchin	S. Louis Shore & Richard Fischer
Mark Lee Schwartzman	George H. Lowitz
Gerald S. Spector	Ben Aronin
Cecil W. Weiss	Jerome Sax & James H. Nudelman

ELECTED TO MEMBERSHIP

Edward G. Bazelon	Howard G. Joseph
Harry C. Diamond	Henry L. Kane
Arthur A. Ellis	Philip Teinowitz
Morris M. Ellis	Charles D. Snewind
Leon J. Garrie	Howard M. Watt
Seymour A. Greenblatt	Morris M. Wiczer

SAUL A. EPTON — AUTHOR

The Insurance Law Journal, August issue, contains an article by Saul A. Epton, member of our Board of Managers.

Epton discusses the practices of insurance companies and policy holders in arriving at settlements and concludes that "the insurance industry will best be served in the future in the courts rather than by a board of arbitration."

CARL B. SUSSMAN

Past President Carl B. Sussman was appointed by the Illinois State Bar Association a member of its Cook County Committee on local bar organizations. The purpose of this committee is to work toward the integration of all bar associations in Cook County.

HAROLD E. FRIEDMAN

Member Harold E. Friedman was reelected President of the Progressive Order of the West, a Jewish fraternal organization which numbers more than 5000 members.

MAX KOENIG

Member Max Koenig of New York City, in Chicago recently, spent over a month this year in Holland, representing an American citizen.

The McCarran-Walter Bill and The Decalogue Society of Lawyers

Although the Congressional committees had been working for some time on the codification of the naturalization and immigration laws, the McCarran-Walter Bill reached the enactment stage last spring with terrifying suddenness. The best hope of The Decalogue Society of Lawyers and others seeking more enlightened legislation was that either house would sustain President Truman's forthright veto. The board of managers authorized a committee headed by President Harry A. Iseberg and Civic Affairs Chairman Elmer Gertz to take steps to make our influence felt. First Vice President Paul G. Annes and Samuel Golden worked with Messrs. Iseberg and Gertz in the most diligent manner. A telegram was sent to the President commending his veto message.

We already knew that Senator Paul H. Douglas was with us in the fight, and in a telegram we commended him and urged him to vote to sustain the President. To Senator Everett M. Dirksen who has previously indicated his full sympathies with this Bill we wrote as follows:

"The Decalogue Society of Lawyers, third largest bar group of Illinois, by unanimous vote of its board of managers, urges you to sustain the President's veto of the McCarran-Walter Immigration Bill. Millions of Americans whose ancestors came from every part of the world and who helped create the vast resources and greatness of our nation are bitterly disappointed that the Congress saw fit to enact a law which places the foreign-born in a second class category. We feel that the McCarran-Walter Act repudiates historical American principles of equal opportunity for all persons, regardless of race, color or creed, and impairs good relations with other nations. The pending laws require reexamination and codification in an unhurried spirit of fairness. We feel that no good will result from offending those Americans whose ancestry is not Anglo-Saxon. America should create international good will by a reaffirmance of the faith of the founding fathers."

As President Truman pointed out in his message to us, his veto failed by just two votes of being sustained in the Senate; and, as Senator Douglas told us, "the unavoidable absence of our adherents" contributed to the result. The President told us that "the Bill was a step backward in the immigration and naturalization policy of our country." Douglas expressed the "hope that future Congresses will undo some of the damage that this Act will cause."

Senator Dirksen sent us a letter which we regarded as significant. He said:

"The President's veto of the McCarran-Walter Bill was overridden by both House and Senate, and I voted to override on the ground that the veto message did not make out a persuasive case for a support of the veto.

"To be sure, there appear to be some provisions in the bill which may require subsequent remedy but it did contain many provisions which were long overdue.

"Incidentally, the staff of the Senate Judiciary Committee worked in sustained fashion for nearly three years to revise the crazy-quilt of statutes relating to immigration, naturalization and deportation and put them in better form.

"I am confident that if and when hardships, discriminations and other inequities develop that the Congress will give ready and sympathetic consideration to these problems."

Thereupon, with the approval of our board of managers, The Decalogue Society authorized its committee to work towards the revision of the McCarran-Walter Act. We submitted to the Platform Committee of the Democratic National Convention a proposed plank (the Republican Convention having passed by before we could make similar overtures to it). Our proposed plank read, as follows:

"America's world preeminence stems from the greatness of its people, who have come from every nation and every race. America should continue to have the benefit of immigration by people of broad backgrounds and diversified talents, to the full extent of our economic ability to absorb them.

"The Democratic Party, therefore, will seek to revise the immigration and naturalization laws of this country so as to increase the total number of annual immigrants, eliminate the racial and national inequities in the present quota system, and accord to prospective immigrants and resident aliens the judicial and administrative due process that is the basic tradition of our democratic system of government.

"We favor legislation which will permit the utilization of unused quotas of any nation by other worthy persons desiring admission. During this immediate period of unsettlement in the world, we believe displaced persons should be admitted in larger numbers. Present law should be revised to eliminate provisions which place the resident foreign born in jeopardy of deportation upon arbitrary and unjustified grounds."

If one will compare this with the plank as adopted by the convention, it will be seen that the movement for revision of the McCarran-Walter Act is well under way. The Decalogue Society intends to continue its campaign for the revision of one of the worst pieces of legislation in American history.

BOOK REVIEWS

The Spirit of Liberty. Papers and addresses of Learned Hand. Collected and with an introduction and notes by Irving Dilliard. Alfred A. Knopf. 262 pp. $3.50.

Reviewed by JULIUS J. HOFFMAN

Member of our Board of Managers, Julius J. Hoffman is Judge of the Superior Court, Cook County.

The Spirit of Liberty, which is the spirit of the author, is a book for all members of the legal profession and, indeed, for all thoughtful Americans. No lawyer needs an introduction to Judge Learned Hand, a member of the bar for fifty-five years and (until his retirement in June, 1951) for forty-two years one of the most distinguished federal judges. His opinions —nearly two thousand of them—are significant not only for their legal content but also because they compose a picture of a great man. His non-legal speeches and articles give color and depth to that picture which today and in the future is certain to be recognized as an American masterpiece.

Thirty-four of these papers, collected by Irving Dilliard, comprise *The Spirit of Liberty.* Chronologically, they range from the class day oration which young Learned Hand wrote when he was graduated *summa cum laude* from Harvard, to the address he delivered on the occasion of his eightieth birthday in January of this year. From beginning to end, these articles and speeches are ageless and timeless in their vigor, profundity and sympathy. Their content represents the search of a wise and cultivated, temperate and honest mind for answers to questions which concern us all. The papers have especial interest for the lawyer, because they deal with the problems which constantly confront him: the meaning of justice, the function of the judge, the processes of government, public morals, democracy, liberty.

Judge Hand offers no final answers because he does not believe in finality but sees life as a process of constant change. "Life overflows its moulds," he says, and submits that it is the part of wisdom to cultivate skepticism and detachment, to be guided by reason and to search for truth; never to be stampeded by propaganda or blocked by dogmatism. Man, he says, is a blundering creature who must grope his way. ". . . . there are no immutable laws to which he can turn . . . Conflict is normal; we reach accommodations as wisdom may teach us that it does not pay to fight. And wisdom may; for wisdom comes as false assurance goes—false assurance, that grows from pride in our powers and ignorance of our ignorance. Beware then of heathen gods; have no confidence in principles that come to us in the trappings of the eternal. Meet them with gentle irony, friendly skepticism and an open soul. Nor be cast down; for it is always dawn."

Applying his own formula to the consideration of democracy, he over-rates neither its strength nor its weakness. He regrets that under our system, which permits organized special interests to prevail over those which are not organized and which make no demands, "the aggressive and insistent will have disproportionate power." He would prefer "the still small voice of reason." However, "in a world where the stronger have always had their way I am glad if I can keep them from having it without stint." This, he says, is what our system does. "It gives a bloodless measure of social forces . . . a means of continuity, a principle of stability, a relief from the paralyzing terror of revolution." This he contrasts with those systems under which government "is conducted not by compromise but by coup d'etat."

Judge Hand's papers are so succinct that it is both difficult and unfair to summarize them, but they are so cogent that it is impossible to resist the temptation to quote. Regarding the law, he urges that the profession "continue to represent a larger, more varied social will by a broader, more comprehensive interpretation . . . The lawyer must either learn to live more capaciously or be content to find himself continuously less trusted, more circumscribed, till he becomes hardly more than a minor administrator, confined to a monotonous round of record and routine, without dignity, inspiration or respect."

The dual nature of the court's obligation is of deep concern to Judge Hand because he sees with the greatest clarity the problem of finding in strict accordance with the law and at the same time interpreting it in the light of current ideas and conditions. He points out that a decision which does not represent the intent of the law is a usurpation of governmental power. On the other hand, the law, unlike the sciences, uses no precise language capable of only one interpretation. Furthermore, it does not cover every possible contingency. For that reason, and because a literal application may run counter to common sense in a given case, the judge must take into account the circumstances and the attitudes of the day. Even those persons who insist that the court regard nothing but the letter of the law are not disinterested, Judge Hand points out. In general they are the ones most likely to be

benefited by this practice; if they expected to gain by a more liberal interpretation they would "as eagerly encourage judicial initiative."

Justice Cardozo's solution to the problem was his great contribution to his time:

"Do not understand me to suppose that there is a solution in the sense that one finds an answer to a problem in algebra or geometry . . . A judge must think of himself as an artist, he (Cardozo) said, who although he must know the handbooks, should never trust them for his guidance; in the end he must rely upon his almost instinctive sense of where the line lay between the word and the purpose which lay behind it; he must somehow manage to be true to both."

Irving Dilliard, one of the editors of the "St. Louis Post-Dispatch" who edited *The Spirit of Liberty,* contributes an introduction which not only gives a brief biographical sketch of Learned Hand but also expresses the profound admiration felt by those who are acquainted with the judge and his writings. It is not often that a man who thinks so deeply has the power to convey his thoughts so beautifully, that a man of such insight has such restraint, that a man of such scholarship is so warmly human.

The Supreme Court and The Commander In Chief, by Clinton Rossiter. Cornell University Press. 145 pp. $2.50.

Reviewed by PAUL G. ANNES

This is a "little book on a big subject": the war powers of the President. Anyone interested in the judicial case history in this field will find here the citations and a good discussion, too; and will close the book with the feeling that the author's conclusions are justified by the record.

In the main these are that, in the nature of things, the President's war powers cannot for the most part be well tested during the emergency—and afterwards, it is of little use. In the words of Prof. Rossiter:

"As in the past, so in the future, President and Congress will fight our wars with little or no thought about reckoning with the Supreme Court. Such major constitutional issues as the hotly contested questions of the President's authority to station troops in Europe will be resolved politically, not judicially."

MEMBERS — CANDIDATES FOR PUBLIC OFFICE

The following members of THE DECALOGUE SOCIETY OF LAWYERS are candidates for public office. Election Day, Tuesday November 4th.

ON THE DEMOCRATIC TICKET:

Judges Jacob M. Braude and **Joseph J. Drucker** of the Municipal Court are candidates to succeed themselves.

Member Benjamin Nelson is candidate for Senator of the 19th Senatorial District.

Congressman A. J. Sabath of the 7th District and **Congressman Sidney R. Yates** of the 9th are candidates for reelection.

ON THE REPUBLICAN TICKET:

Members Max Gaynes and **Irving E. Glickman** are aspirants for Judgeships.

Member Irving Landesman is the nominee for a trusteeship of the Sanitary District.

Member Philip H. Mitchel is candidate for the post of Cook County Recorder of Deeds.

Senator Edward P. Saltiel of the 31st Senatorial District is candidate for reelection.

H. BURTON SCHATZ

H. Burton Schatz, member of our Board of Managers was recently elected President of the Chicago Council, B'nai B'rith. This Council comprises 33 B'nai B'rith lodges in Chicago and the surrounding area.

MAX A. REINSTEIN

Member Max A. Reinstein, a graduate of the Northwestern University School of Commerce, was inducted recently into Delta Mu Delta fraternity, an honor accorded a graduate for a consistently high scholastic average.

MAYNARD I. WISHNER

Member of our Board of Managers Maynard I. Wishner, formerly with the Civil Rights Section of The Chicago Commission on Human Relations, is now its acting director. Mr. Wishner succeeds the late Thomas H. Wright.

The Editor will be glad to receive contributions of articles of modest length, from members of The Decalogue Society of Lawyers only, upon subjects of interest to the profession. Communications should be addressed to the Editor, Benjamin Weintroub, 82 West Washington Street, Chicago 2, Ill.

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